Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1996

MELVIN GLEN NEAL,
Petitioner

-against-

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the panel of the Court of Appeals for the Fifth Circuit err in finding that the district judge abused his discretion in dismissing the case against Petitioner when such panel did not have the benefit of the knowledge and information of the district court judge?

2. When Rule 2 of the Rules governing proceedings under 28 U.S.C. 2255 requires that a Motion for Relief be signed under penalty of perjury, does an unsworn response put in issue the facts sworn to in the Motion?

Parties to the Proceeding

The parties to the proceeding in the Fifth Circuit and in the United States District Court for the Northern District of Texas are the Petitioner, Melvin Glen Neal, and the United States of America.

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No. _____

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Supreme Court of the United States

October Term, 1996

MELVIN GLEN NEAL,
Petitioner

VS.

THE UNITED STATES OF AMERICA,
Respondent

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

==========

Petitioner herein respectfully prays that writ of certiorari issue to review the order of the United State Court of Appeals for the Fifth Circuit entered in this action on August 9, 1996.

OPINIONS BELOW

There are no reported opinions of any of the proceedings in this case below except the opinion on the appeal of the original case in the Trial Court which is reported as **U.S. vs. Neal** 27 F3d 1035 (Fifth Circuit, 1994).

BASIS FOR JURISDICTION

The Court of Appeals entered its judgment remanding this proceeding to the District Court on August 9, 1996. Petitioner requested a rehearing and such relief was denied on September 6, 1996. Pursuant to Supreme Court Rule 13, this petition must be filed by December 5, 1996. This Court has jurisdiction to review the order of the Court of Appeals pursuant to 28 USC 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty or property without due process of law...

28 U.S. Code 2255.

> This statute is copied in full and appears in the Appendix at page A-11.

Rules Governing Proceedings Under the Provisions of U.S.C. 2255, Rules 1 through 8(a):

A copy of these rules appears in the Appendix at page A-14.

STATEMENT OF THE CASE

Petitioner Neal, along with 12 other persons was convicted of criminal offenses in 1989. The trial lasted approximately 11 months, involved a great amount of documentation and the testimony of more than 35 witnesses. The case was a pre-sentencing guidelines case. By virtue of various appeals and alterations of the sentence, Neal, by the spring of 1995, was facing approximately a 7 year sentence. During the interim between the trial and 1995 Neal had become aware of certain facts relating to the trial, the witnesses and the action of the attorneys representing the United States. Such matters were all of a nature that they were not covered by any of the prior appeals.

On June 2, 1995, Neal filed for relief under the provisions of 28 U.S.C. 2255 and the Rules governing proceedings thereunder. The

Court did not dismiss the motion and directed the government to file an answer within 60 days. The government filed such an answer, unverified. Subsequently, on August 17, 1995, Neal filed an Amended Motion for relief. A copy of such motion is included in the Appendix hereto, beginning at page A-24. It is noted that Mr. Schattman, the attorney whose conduct gave rise to a substantial portion of the allegations contained in Neal's Amended Motion for Relief, also appeared in this 2255 Motion as counsel for the government. On one or more occasions between August 17 and September 21, 1995, such attorney engaged in ex parte communication with the Court, and was directed to file an answer by September 11, 1995. The record reflects that an answer was filed on September 21, 1995, although such answer did not come to the Court's attention. Such answer was unsworn. On October 2, 1995, the Court entered an Order of Dismissal granting Neal's 2255 Motion. This document appears in the

Appendix at page A-3. Government counsel became aware of this order on October 3, 1995, however no action was taken by the government and, on October 16, 1995, the Judge signed a judgment granting Neal's motions and dismissing the case against him, with prejudice. This judgment appears in the Appendix at page A-4.

Subsequently, on October 26, 1995, the government filed a motion to set aside both the October 2 Order and October 16 Judgment. This motion, as all other government pleadings, was not verified or sworn to and no affidavit was attached. On October 30, 1995, the Judge signed an order denying the government's motion to set aside the prior judgment. A copy of this order appears in the Appendix at page A-6.

Thereafter the government appealed to the Court of Appeals for the Fifth Circuit and after receipt of responsive pleadings, briefing, and hearing, the Fifth Circuit remanded the case to the United States District Court for the Northern District of Texas. A

copy of this order appears in the Appendix at page A-1. Neal filed his motion for rehearing, which was overruled on September 6, 1996, by order shown in the Appendix at page A-10.

REASONS FOR GRANTING THE WRIT

1. **The action of the district judge in granting the relief requested by Petitioner was not an abuse of discretion but was within the discretionary rights granted to him by the 2255 rules.**

A. 28 U.S.C. 2255: Prior to February 1, 1977, proceedings under Section 2255 were controlled by the Section itself and by either the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure, neither of which set of rules had any specific provisions relating to 2255. In the time period prior to February 1, 1977, when a motion was filed, the Judge was authorized to:

1. Dismiss the motion if such motion and the files and records of the case conclusively show that the applicant was entitled to no relief.

2. In the absence of the above, the Judge is required to cause a notice to be served on the United States Attorney.

3. Grant a hearing on the motion.

4. Determine the issues.

5. Make Findings of Fact and Conclusions of Law with respect thereto.

The Judge, upon making findings and conclusions favorable to the Movant was given the power to:

6. Vacate and set the judgment aside and discharge the prisoner, or

7. Resentence him, or

8. Grant a new trial, or

9. Correct a sentence as appeared appropriate.

It is noted that if the court did not dismiss the motion under 1., he was required by

3. to grant a hearing and by 4. to make findings of fact and conclusions of law. This is pointed out because the Rules somewhat changed the procedure and many 2255 cases decided after February, 1977, were properly handled under the prior procedure.

B. Rules: Effective as to motions filed after February 1, 1977, Congress adopted Rules pertaining to proceedings under Section 2255, some of which are the following:

1. Rule 2(b) provides, in part, that a motion for such relief should be signed under penalty of perjury.

2. Rule 4(a) provides that the motion should be presented to the Judge of the District Court who presided at the Movant's trial and sentenced him or, if the Judge who imposed sentence was not the trial Judge, then it should go to the Judge who was in charge of the portion of the proceedings being attacked by the Movant.

3. Upon receipt of the motion together with files, etc., the Judge is required to examine such matters. If it appears from the face of the motion and exhibits in prior proceedings that the Movant is not entitled to relief, the Judge can summarily dismiss the proceeding. This is a discretion call for the Judge.

4. If the Judge does not summarily dismiss the Motion, he is required to order the U.S. Attorney to file an answer or other pleading within the time fixed by the Court, or to take such other action as the Judge deems appropriate. This is another discretion call for the Judge.

5. Rule 5 relates to the answer of the Government and its contents.

6. Rule 6 and 7 relate to discovery and adding material to the record if the Judge desires. In Rule 7(b), there is a specific provision that, "Affidavits may be submitted and considered as a part of the record."

7. Rule 8 is styled "Evidentiary Hearing." As pointed out above, at the time a motion is first presented to the Judge, he has the discretion to make an initial decision as to whether the proceedings go any further. Rule 8 provides that if the motion has not been dismissed earlier, after an answer is filed and the Judge has in his possession transcripts and other records, he **SHALL** (emphasis supplied), upon a review of these proceedings and records, if any, **DETERMINE** (emphasis supplied) whether an evidentiary hearing is required. This is the third time the Court gets to exercise his discretion. In such discretion, if it appears to the Court that an evidentiary hearing is **NOT** (emphasis supplied) required, the Judge shall make such disposition of the motion as justice dictates. Again, this is a grant of discretion. The Judge is authorized to determine what justice dictates.

The Rules changed former procedure in that a hearing is not mandatory nor does the Rule require findings of fact and conclusions of law. Again, this is a grant of discretion. The judge is authorized to determine what justice dictates.

C. THE COURT'S INFORMATION

1. On October 2, 1995, (the day the judge signed the original order granting relief) he had both of Neal's verified Motions and the Government's unverified First Answer. On October 16, 1995 the Judge had not only the earlier pleadings but also the Government's Second Answer, also unverified.

2. In addition to the pleadings and case records in his possession, or available to him, the Court had his personal knowledge of the case and the parties involved and was entitled to rely on it, including his observations and recollections to supplement the record in this proceeding. **Dziurgot v. Luther**, 897 F2d, 1222 (1st Circuit 1990). The Judge's right to use

such knowledge in a 2255 proceeding was not contested by the Government. In the proceeding before the Court of Appeals the Government filed its Reply Brief and at the bottom of Page 3 and top of Page 4 thereof it was stated, **"Second, the Government had no difficulty with the proposition that a District Court may rely on its own recollection, observation and knowledge when reviewing a Movant's contentions in a Section 2255 motion".**

3. One of the unusual things about proceedings under the 2255 rules is that the court is not limited to consideration of just files and records. Petitioner has included in the Appendix beginning at Page A-24 the Amended Motion for Relief filed by him on August 17, 1995. It is hoped that the members of the Supreme Court considering this Petition will examine such prior pleading in order to understand and evaluate the nature of the misconduct alleged as the basis for this proceeding and the judge's knowledge and

observations. Judge Belew was familiar with this case. The trial of the case took the biggest part of his time for approximately eleven months. He was familiar with the persons involved, including the Prosecutors. He was particularly in a position to know the validity of the matters raised in the last portion of Movant's First Amended Motion.

4. The members of the Court of Appeals panel, when passing on this case, had no way to know the extent of the knowledge of Judge Belew at the time he granted Neal's relief. Without such knowledge, such panel was not in a position to determine abuse of discretion.

2. The granting of relief to Petitioner by the District Court was not an abusive use of discretion because, at the time of such action, there was no fact issue as to Petitioner's right to such relief.

A. As pointed out above, the Government did not file any verified pleadings relating to Neal's motion or the disposition thereof. Neal's pleadings were verified, as required by Rule 2(b). The Government's were not. At the time the Judge gave his preliminary consideration to Neal's motion and other matters relating the judgment under attack, he did not make an order for its summary dismissal, as provided by Rule 4(b). Even after the filing of the Government's second answer there was no need for an evidentiary hearing because unverified pleadings did not put the sworn allegations of Petitioner in issue. The Advisory Committee notes in connection with Rule 5 mention that such Rule does not specifically call for a return or answer by the United States Attorney or set any time limits as to when it must be submitted. The Advisory Committee then notes, "The general practice, however, if the motion is not summarily dismissed is for the Government to

file an answer to the motion as well as counter-affidavits when appropriate." Numerous cases have held that the Government's answer and affidavits are not conclusive against the movant and if they raise disputed issues of fact a hearing must be held. **Machibroda v. United States** 368 U.S. 487, 494, 495 (1962); **United States v. Salerno**, 290 F.2d 105, 106 (2d Cir. 1961); **Romero v. United States**, 327 F.2d 711, 712 (5th Cir. 1964); **Scott v. United States**, 349 F.2d 641, 642, 643 (6th Cir. 1965); **Schiebelhut v. United States**, 357 F2d 743, 745 (6th Cir. 1966); and **Del Piano v. United States**, 362 F.2d 931, 932, 933 (3d Cir. 1966). All of these cases were decided under the statute, prior to 1976. It only follows that if there are no sworn pleadings or affidavits, no fact issue exists.

At the time this case went before the Court of Appeals, it was joined with a similar appeal involving a party named Duncan and the Government's briefing covered both cases. The

Duncan case differed from that of Petitioner because the Government answers in Duncan were supported by affidavits. The Government appeared to recognize the fact that, in the absence of affidavit or sworn pleadings, factual issues were not in issue. At the bottom of page 11 of its original brief in the Court of Appeals the Government, referring to the Duncan motion stated, "**Moreover the factual allegations contained in Section 2255 motions were put in issue by the affidavit filed with the Government's Response.**" Similarly, in the Government's Response to Duncan's 2255 motion, at page 14 thereof, the Government stated, "**The affidavit from trial prosecutor, Fred Schattman, which is attached hereto, puts in issue all of the factual allegations made by Duncan**", citing **Machibroda v. United States**, supra. Schattman, the prosecutor, saw fit to file affidavits in connection with Duncan. He did not see fit to file affidavits or sworn pleadings in connection with Petitioner. In

such case a hearing was necessary, because as the Court stated, **"The factual allegations contained in the Petitioner's Motion and Affidavit and put in issue by the Affidavit filed with the Government's Response..."**. In **Peevy v. United States** 31 F.3d 1341, at page 1346 (6th Cir. 1994), in considering a 2255 motion where the Government was opposing a Movant's attempt to get a hearing with unsworn documents and the District Court had refused to grant a hearing, the Appellate Court reversed because, **"The unverified responses filed in this case were plainly inadequate. The District Court's factual finding in support of its dismissal of Peevy's motion, based on the Government's responses have no evidentiary support"**.

This is not a case where the Government accidentally failed to attach or include something in pleadings that it intended to include. The Government filed three separate

pleadings (both Answers and its Motion to Set Aside) without verification.

In the state of the record on October 2, 1995, on October 16, 1995, and on October 30, 1995, as a matter of law, Petitioner was entitled to the vacation of his sentence and dismissal of the case against him because the facts in the record created by his verified pleadings established that right. Under the provisions of 2255, Rule 8, in the state of the record on such dates, no evidentiary hearing was necessary because there was nothing to be decided by such hearing. The Court was authorized by such rule to, **"Make such disposition of the motion as justice dictates."** The Judge did just that. His action of dismissing the case could not be an abuse of discretion. He did not sanction the Government by giving away a viable position because on such dates, the Government had no viable position.

CONCLUSION

Petitioner is aware of various cases in which the Courts have held that delays by the Government in filing an answer are not sufficient to bring about a dismissal. Many of these are prior to the adoption of the 2255 Rules. Many of them are situation specific. Petitioner submits to the Court that this case is different and asks the Court to consider the following:

A. The Court found Petitioner's Motion for Relief sufficient. This is evidenced by the fact that he did not dismiss at that time.

B. The Government, acting through the very prosecutor whose conduct was in issue, filed two answers without swearing to the truth of the material contained therein.

C. Even after the Trial Court had dismissed Petitioner's case, and in an attempt to have such Order set aside, the representative of the Government (the same prosecutor whose conduct was in question) did

not see fit to support his Motion to Set Aside the Dismissal under oath.

D. The prosecutor engaged in ex parte conversations with the Court and was given specific instructions about filing a response and the time to do it. He did not comply with the Court's instruction.

E. There is even an open question about the date of the filing of the Government's second answer which was purportedly misplaced in the Clerk's office.

F. There can be no doubt as to the Judge's intention to dismiss the case against Petitioner. Everything in the record evidences that intention.

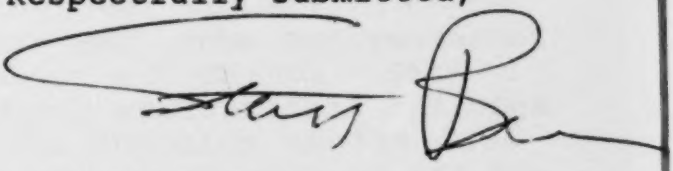
G. The Judge was vested with the authority to dismiss the case. He was vested with the discretion to dismiss the case.

H. The Judge exercised that authority and discretion.

For the reasons set out above, Petitioner prays that the Court grant a writ of certiorari

herein and that he have such other and further relief to which the Court may find him entitled.

Respectfully submitted,



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Supreme Court of the United States

October Term, 1996

MELVIN GLEN NEAL,
Petitioner

VS.

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Respondent

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APPENDIX OF PETITIONER

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-11124

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

MELVIN GLEN NEAL, also known as Glen Neal

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas (4:95-CV-405-K)

BEFORE KING, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

The district court's judgment entered October 2, 1995, granting Melvin Glen Neal's Motion to Vacate or Correct Sentence under 28 U.S.C. 2255, as amended, and dismissing with prejudice "the case against Melvin Glen Neal" is vacated. The district court abused its

discretion in granting the writ and dismissing the case against Neal as a sanction for the government's tardiness in filing its response to Neal's amended motion. The case is remanded to the district court for further proceedings.

VACATED and REMANDED.

NOTE: This document is file marked by the Clerk of the U.S. Court of Appeals on August 9, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	**§**	
	§	
VS.	**§**	**CRIMINAL NO.**
	§	**4:87-CR-082-K**
MELVIN GLEN NEAL	**§**	

ORDER OF DISMISSAL

Pending before Court are numerous Motions filed by Defendant Melvin Glen Neal. The Government having failed to respond to the Motions filed by Defendant Neal, it is therefore ORDERED, ADJUDGED and DECREED that the case against Defendant Melvin Glen Neal be and the same is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

SIGNED this 2nd day of October, 1995.

/s/
DAVID O. BELEW, JR.
United States District Judge

NOTE: This document is file marked by the Clerk of the U.S. District Court, Northern District of Texas on October 2, 1995.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA	**§**	
	§	
VS.	**§**	**CRIMINAL NO.**
	§	**4:87-CR-082-K**
MELVIN GLEN NEAL	**§**	

JUDGMENT

Pursuant to the Order of Dismissal entered by the Court on October 2, 1995 in the above-styled and numbered cause,

It is hereby ORDERED and ADJUDGED that Defendant Melvin Glen Neal's Motion to Vacate or Correct Sentence Under 28 U.S.C. §2255 filed June 2, 1995, and Amended Motion to Vacate or Correct Sentence Under 28 U.S.C. §2255 filed August 17, 1995, are hereby GRANTED, and the case against Melvin Glen Neal is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

SIGNED this 16th day of October, 1995.

/s/
DAVID O. BELEW, JR.
United States District Judge

NOTE: This document was filed in the office of the Clerk for the U.S. District Court, Northern District of Texas on October 16, 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	**CRIMINAL NO.**
	)	**4:87-cr-082-k**
MELVIN GLEN NEAL	)	

ORDER DENYING GOVERNMENT'S MOTION TO SET ASIDE, ALTER OR AMEND JUDGMENT

On this day came on to be considered the Government's Motion to Set Aside, Alter, or Amend Judgment filed October 26, 1995. The Court acknowledges that it mistakenly stated that the Government failed to respond to the "Motions" filed by Defendant Neal. The Court is aware that the Government had in fact responded to the original 2255 Motion filed by Defendant Neal on June 2, 1995. However, the Government failed to timely respond to Defendant Neal's Amended 2255 Motion filed August 17, 1995. Pursuant to Local Rule 5.1(e), the Government's Response to the Amended Motion was due September 11, 1995.

In August, 1995, shortly after the Amended

Motion was filed, the Court met with the prosecutor and informed him that the Government's response to the Amended Motion would be due on September 11, 1995. The Prosecutor then informed the Court he would "file a response in a couple of days". After the September 11, 1995 deadline had passed, the Court's staff, at the request of the Judge, made repeated telephone calls to the prosecutor's office requesting that an Answer be filed to the Amended Motion. No Answer was filed until September 21, 1995, 10 days after the deadline. Further, the Government did not request and extension of time to respond.

Further, the Court made numerous inquires, including the week of September 25, 1995, to the District Clerk's Office as to whether or not the Government had filed its Answer to the Amended 2255 Motion. On each occasion, the District Clerk informed the Court that no Answer had been filed. On October 2, 1995, the court still had not received the Government's

Answer to the Amended 2255 Motion, and requested the District Clerk to check the docket sheet to see if an Answer had indeed been filed. The Clerk informed the Court that no Answer was on file as of October 2, 1995. Therefore, the Court entered its Order of Dismissal granting Defendant Neal's Amended 2255 Motion on October 2, 1995.

On October 3, 1995, the Government's Answer, which was file marked September 21, 1995, was delivered by the Clerk to the Judge's office with a note stating that it had been overlooked. After discovering this error, the Clerk's staff, without instruction from the Judge, telephoned the prosecutor and informed him that indeed an Answer had been filed and that the Court would probably enter an order vacating the Order of Dismissal. However, when the Court's staff informed the Judge of the forgoing events, the Judge stated that the Answer was indeed at least 10 days late, and the prosecutor having ignored the Court's

repeated calls, the Order of Dismissal would not be vacated.

Therefore, it is the opinion of this Court, that the Judgment in this case should not be vacated and set aside.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the Government's Motion to Set Aside, Alter, or Amend Judgment is in all things hereby **DENIED.**

IT IS SO ORDERED.

SIGNED this 30th day of October, 1995.

/s/
DAVID O. BELEW, JR.
United States District Judge

NOTE: This document is file marked by the U. S. District Clerk for the Northern District of Texas on October 30, 1995.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-11124

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

MELVIN GLEN NEAL, also known as Glen Neal

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(September 6, 1996)

Before KING, SMITH and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Court Judge

REHG-2

NOTE: This document is file marked by the Clerk of the U. S. Court of Appeals on September 6, 1996.

JUDICIARY AND JUDICIAL PROCEDURE
28 U.S.C. 2255

2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make

findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a

write of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

Rules 1 - 8(a)

Rules 8(B) - 12 Omitted

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a

judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral atack.

Rule 2. Motion:

(a) **Nature of Application for Relief.** If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) **Form of motion.** The motion shall be in substantially the form annexed to these rules, except that any district court may by

local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) **Motion to be directed to one judgment only.** A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject

to future custody, as the case may be, he shall do so by separate motions.

(d) **Return of insufficient motion.** If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

Rule 3, Filing Motion

(a) **Place of filing; copies.** A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) **Filing and service.** Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed.

He shall thereupon deliver or serve a copy of the motion together with a notice of the filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge

(a) **Reference to judge; dismissal or order to answer.** The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in acccordance with the procedure of the court for the assignment of its business.

(b) **Initial consideration by judge.** The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwsise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 5. Answer: Contents

(a) **Contents of answer.** The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions

under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) **Supplementing the answer.** The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of the items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

Rule 6, Discovery.

(a) **Leave of court required.** A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the

exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualified for appointment of counsel under 18 U.S.C. 3006A(g)

(b) **Requests for discovery.** Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) **Expenses.** If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

Rule 7. Expansion of Record

(a) **Direction for expansion.** If the motion is not dismissed summarily, the judge

may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) **Materials to be added.** The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) **Submission to opposing party.** In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) **Authentication.** The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary Hearing

(a) **Determination by Court.** If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CRIMINAL NO.
	)	4:87-CR-082-K
MELVIN GLEN NEAL	)	CIVIL NO.
	)	4:95-CV-405-k

AMENDED MOTION TO VACATE OR CORRECT

SENTENCE UNDER 28 U.S.C. 2255

Name Melvin Glenn Neal

Prison Number None

Place of Confinement None

United States District Court Northern

District of Texas

Ft. Worth Division

Case No. 4:87-CR-082-K (4:95-CV-405-K) **(to be supplied by Clerk of U.S. District Court)**

United States,

V.

MELVIN GLEN NEAL

(full name of movant)

AMENDED MOTION

1. Name and location of court which entered the judgment of conviction under attack United States District Court for the Northern District of Texas, Ft. Worth Division

2. Date of judgment of conviction September 11, 1990

3. Length of sentence Count 5 - 70 years, Count 1 - 15 years, Count 43 - 5 years, 21 additional counts - 10 years. All sentences to run concurrently. The trial court subsequently reduced the sentence on Count 5 to 12 years and reduced the sentence on the 21 Counts to 5 years each. Count 1 was dismissed by the Fifth Circuit on Appeal

4. Nature of offense involved (all counts) Count 1 which was dismissed by the Fifth Circuit was conspiracy. Count 5 was continuing criminal enterprise. Count 43 was an Internal Revenue violation of failure to pay taxes.

The other 21 counts were cash transaction report violations.

5. What was your plea? (Check one)

(a) Not guilty X

(b) Guilty _____

(c) Nolo contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

6. Kind of trial: (Check one)

(a) Jury X

(b) Judge only _____

7. Did you testify at the trial?

Yes _____ No X

8. Did you appeal from the judgment of conviction?

Yes X No _____

9. If you did appeal, answer the following:

(a) Name of court United States Court

of Appeals, Fifth Circuit, Cause No. 901957

(b) Result Count 1 dismissed, all other counts affirmed

(c) Date of result July 21, 1994

(a) Name of court United States Supreme Court, Cause No. CR 4-87-82-K

(b) Result All counts affirmed.

(c) Date of result December 20, 1994

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes _____ No X

11. Not applicable

12. The grounds on which I claim that I was unlawfully convicted are the following:

(a) Gilbert Smith was a Co-Defendant. Gilbert Smith is an attorney who, throughout the period of time involved in the acts which gave rise to the indictment in this case acted as an attorney for some

of the individual Defendants (but not for Movant individually), and for various corporations which employed Movant. At the trial of this cause the Court did not allow Mr. Smith to testify. A portion of the Prosecutions evidence against Movant was the testimony of Terry Vernon, another attorney. This testimony related to a meeting concerning the business activities of the various corporations involved in the transactions giving rise to this indictment. Mr. Vernon's testimony was one of the major pieces of information that connected Movant to a majority of the illegal acts alleged by the Prosecution in this case. Mr. Vernon's testimony was untrue. The testimony of Mr. Smith, if it had been allowed, would have established the perjured nature of the Vernon testimony, and in all likelihood, would have completely discredited such testimony. Without the Vernon testimony

being believed by the jury, Movant, based on the totality of the evidence, Movant should have been acquitted.

Having the lawyer involved in the transactions as a Co-Defendant deprived Movant of the benefit of his testimony. Although the testimony should have been available, it was not. The determination by the Prosecution of the identity of Defendants is believed to have been deliberately planned to vitiate the benefit of testimony and lay the ground work for conviction. Such situation deprived Movant of a fair trial, or an opportunity to present his defenses.

(b) LaDonna Jackson was a witness for the Prosecution. Ms. Jackson perjured herself in her testimony relating to allegedly buying chemicals from an entity owned by Movant (N & H Repackaging Co.). Her testimony on this matter was false and was very damaging to Movant in that it, if

believed by the jury, tied Movant to overt acts of other Defendants. Testimony concerning the nonexistence of the transaction testified to by Ms. Jackson could have been obtained from Mr. Smith if he had been allowed to testify. Since the trial of this case, Movant has discovered evidence of a transaction between Ms. Jackson and the U.S. Attorney under the terms of which, in exchange for her perjured testimony, the government agreed to provide Ms. Jackson with post-trial employment for the United States. The United States lived up to its agreement. Although it is universal that persons with criminal background are <u>not</u> employed by the United States Courts and United States Department of Justice, Ms. Jackson is presently employed as a United States Probation Officer in Waco, Texas. Ms. Jackson was described by the United States in connection with this case as an

"unindicted co-conspirator". Discovery will be necessary to bring before the Court all of the factual matters relating to the relationship between Ms. Jackson and the individual prosecutors in this case.

(c) A number of the Prosecution witnesses who were officers of either the State of Texas or various municipalities testified concerning a business enterprise operated jointly by the Texas Department of Public Safety and the Federal Drug Enforcement Administration in Dallas, Texas, known as Metroplex. As the Court is aware, this was a sting operation where the governmental agencies involved sold the chemicals necessary to make controlled substances to the persons who desired to engage in such transactions. For a period of time, according to the evidence, there was full cooperation between the State of Texas and DEA. At sometime, the State

authorities decided to withdraw because of a policy dispute over the methods to control illegal substance activities. In the initial stages of the trial, various officers testified as to the lack of internal surveillance at the Metroplex location and the lack of the actual staffing of such business by law enforcement officers. Particularly, such testimony was provided by Johnny Prince of the DPS, M. L. Pitts of the North Richland Hills Police Department, R. B. Nowland of the Hurst Police Department, Dan Easterwood of DPS and Bobby Givens of DPS. Subsequent testimony established the connection of DEA and DPS with the Metroplex store and the actual involvement of law enforcement officers in the sale of the raw materials necessary for the manufacture of controlled substances and the relationship between law enforcement officers in the Metroplex store and the

non-officer personnel working with them and the prospective purchasers, particularly women. The Prosecution did not produce any evidence to explain the absolute difference between testimony and evidence in the early part of the trial and the latter part of the trial. The failure to reconcile such differences, and particularly to explain the perjured testimony of the officers testifying in the early part of the trial created a situation where the government's own witnesses left questions unanswered. True testimony about the Metroplex situation, if believed by the jury, would have presented a much more favorable position with the jury for Movant and the other Defendants. It is pointed out that the lead prosecutor in this case, Mr. Schatmann, was actively involved, at the State level, in the activities of the Metroplex operation.

(d) One of the Prosecution witnesses, Carla Holder, testified, untruthfully, concerning the relationship of Movant and various transactions relating to the sale of the materials necessary to make controlled substances. Specifically, she testified concerning alleged false sales tickets, fictitious names, fictitious companies, large cash transactions from drug sales, banking practices and bookkeeping routines, alleging, primarily, that Movant was responsible for all of her activities in such regard. This testimony was untrue. This testimony was extremely damaging to Movant. Ms. Holder was treated as "an unindicted co-conspirator". In the early stages of the investigation of the activities leading up to the indictment in this case, while the lead Prosecutor, Mr. Schattman, was still employed by the Tarrant County District Attorney's office, and while he was

providing guidance to the State investigators, he interviewed and took written statements from Ms. Holder, Richard Patton, and Marilyn Pace. Since the trial of this cause, Movant has determined that the statement given by Ms. Holder was exculpatory insofar as he was concerned and established the lack of any potential guilt against him. At a time subsequent to the taking of such statement, Mr. Schattman, by then an Assistant U. S. Attorney, required Ms. Holder to testify before the Federal Grand Jury. Her Federal Grand Jury testimony was completely different from the statement provided to Mr. Schattman at the State level. Mr. Schattman did not furnish Movant or his Counsel with copies of the favorable statement of Ms. Holder. Had such statement been available, it would have provided material for cross examination of her. The facts related to

this statement were unknown to Movant at the time of trial or appeal. On information and belief, Movant alleges that Ms. Holder was given the option by Mr. Schattman that she either change her testimony and be a witness for the government or that she become a Defendant. The withholding by Mr. Schattman of information favorable to Movant deprived Movant of a fair trial.

(e) The foregoing events deprived Movant of a fair trial. Additionally, the overall prosecution activity relating to this case is believed by Movant to be important because it shows a pattern of the use of criminal prosecution for the personal gain of the Prosecution. Movant presents as a ground for relief the absolute absence of a fair trial and the concentrated effort by the prosecution to obtain, <u>at any cost</u>, either monetarily or ethically, conviction against Movant and

the other Defendants. To fully develop this we go back prior to the appointment of Marvin Collins as United States Attorney for the Northern District of Texas. At that time Mr. Collins was an employee of the Tarrant County District Attorney's office. Two of the attorneys working under him were Fred Schattman and Randy Means. Mr. Collins was appointed as the United States Attorney for the Northern District of Texas. At some time after such appointment, the factual matters which gave rise to the charges in this case became the subject of an investigation by State authorities. This activity was headed primarily by a State of Texas Narcotics Agent named Dunn under the guidance of Mr. Schattman. After a protracted period of investigation, the matter was presented to Tim Curry, the Tarrant County District Attorney. Mr. Curry declined to have his office

prosecute on the evidence he had and the matter was never presented to a Tarrant County Grand Jury. Approximately one year passed and by virtue of a transaction, the exact details which are presently unknown to Movant but which will be available through discovery, Mr. Schattman and Mr. Means left their employment as Assistant District Attorneys in the Tarrant County District Attorney's office and became Assistant United States Attorneys working under Mr. Collins. One of the conditions of their employment was that they bring this case with them for prosecution by the United States Attorney. They fulfilled this condition and the case was ultimately presented to the Federal Grand Jury and then brought to trial. The records relating to this case reflect that it was not a case made by DEA or other United States employees, but was a case made solely by State people. Even at the

trial, only minor routine participation was had by the Drug Enforcement Administration. The case received a great amount of publicity, information primarily being released under the quote of Mr. Collins. The political mileage that was attempted to be made out of this case is widely known, but can be documented by discovery simply by scanning the Fort Worth Star Telegram. Movant believes, and here alleges that Schatmann and Means did everything within their power to obtain convictions without regard to either legal or ethical considerations. As is evident, they succeeded. The success, however, appeared to stop there. Subsequent to the trial of this case, in the melee of persons seeking appointment for a vacancy as a United States District Judge, Mr. Collins received no serious consideration. As politics further go, Mr. Collins subsequently ended his period as United

States Attorney and returned to the Tarrant County District Attorney's office as an employee.

Movant feels that the grounds set out prior to this paragraph are ample reasons for relief under 28 U.S.C. 2255 without consideration of the matters contained in this paragraph. However, realizing that a prosecutor's duty is to fairly evaluate evidence, investigate and present allegations of law violations to the best of his ability, staying within the rules of the courts, in this case as set out herein, the prosecution, for purposes other than simply fulfilling a prosecutor's job, treated this case and Movant for personal gain. Such activity deprived Movant of a fair trial.

13. Not applicable

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes _____ No X

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing James Stanley, 2200 Hemphill St., Ft. Worth, TX 76110

(b) At arraignment and plea Ross Adair, Attorney in the office of Jack Bryant, P. O. Box 282, Abilene, TX 79604

(c) At trial Jack Bryant, P. O. Box 282, Abilene, TX 79604 and Scott Sherrer, address unknown

(d) At sentencing Jack Bryant, P. O. Box 282, Abilene, TX 79604

(e) On appeal Fifth Circuit, David L. Richards, formerly First City Bank Tower, 201 Main St., Suite 600, Ft. Worth, TX 76102, presently Second Court of Appeals, Ft. Worth, TX,

U.S. Supreme Court, Danny D. Burns, 115 N. Henderson St., Ft. Worth, TX 76102

(f) In any post-conviction proceeding (this proceeding) Jack Bryant, P. O. Box 282, Abilene, TX 79604

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes X No _____

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No X

WHEREFORE, Movant, his wife and family have lived under the shadow of this case for ten years. Movant has been subject to the effect of the unjust conviction for 4 1/2 years. Movant prays that: (1) The Court leave him free from confinement during any period necessary for the Courts consideration

hereof and for any required discovery incident to a hearing hereon. (2) That the Court give this Motion full consideration and vacate and set aside the judgment complained of herein. (3) In the alternative the Court grant to him all of the relief to which he may be entitled in this proceeding.

Jack Bryant
P. O. Box 282
Abilene, Texas 79604-0282
(915) 673-6589
FAX (915) 675-5032
State Bar No. 03276000

Attorney for Movant

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on August 16, 1995.

/s/
Melvin Glen Neal

NOTE: This document was file marked by the U.S. District Clerk for the Northern District of Texas on August 17, 1995.